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In The

Supreme Court of the United States

October Term, 1946

No. 910

Jane V. Buckner and Leon Buckner
Defendants-Appellants

vs.

Fred A. Tweed, acting as F. A. Tweed Company
Plaintiff-Appellee

Appeal from the United States Court of Appeals for the District of Columbia

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PETITION FOR REHEARING

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Counsel for Appellant-Petitioners.

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PETITION FOR REHEARING

On behalf of the defendants-appellants-petitioners, Jane V. Buckner and Leon Buckner; we respectfully petition for a rehearing, being most sincerely convinced, if allowed to stand, will ultimately result in a great injustice to property owners when they wish to dispose of their property through real estate brokerage concerns; and might place some of these property owners in a very precarious position when relying upon the confidence they might place on some real estate brokers who might consider volume of

business rather than the quality of their reliability for honest dealings.

In a jury trial between purchaser and defendants, a decision was rendered in favor of defendants (Appdx. 30 and 31). The verdict which was announced by the foreman of the jury, "No meeting of the minds"; and this verdict was decided before the decision in the former trial between plaintiff and defendants was rendered in favor of defendants; and when counsel for plaintiff argued for a new trial, Judge McMahon, of the trial Court according to transcription of the arguments between counsels for both sides at that time, said:

"A part of the delay in deciding this matter was due to the fact that I had heard that the other case which involved a suit between the owners of the property and the prospective sellers had resulted in a verdict, as I recall it, for the defendants which had been appealed, and I was hoping that we might get a little bit of help from the Municipal Court of Appeals. * * *"

The foregoing will explain the importance attached to that jury trial*; and, why should it not be so, when the subject-matter, "Breach of Contract" is the same in both cases; and, with a jury in one case and a Judge trial in another in which defendants were involved, it would seem that the issues in this instant case had been adjudicated. But, after this instant case was reversed in an appeal, and a new trial ordered; in the second trial Court a much stronger case was presented in favor of defendants not considering the lengthy damaging testimony of one witness who was called to testify in behalf of defendants, and the unreliability of this tsetimony will be touched on later.

We feel certain that had this Court been privileged to see and hear the witnesses, it would have reached the same conclusion as the Judge did in the former trial. And when you consider the Kilbourne vs. Sunderland case, 130 U. S. 505, a fairly similar case in some respects, without

* Certified copy showing *Kasson vs. Buckner* case with Clerk of Supreme Court of The United States.

the complications in the Courts as in this instant case and with of course, though one favorable consideration, the greater amount of money involved, but that does not seem shoud be altogether the controlling factor.

It was possible for the counsel for plaintiff to draw inferences in his oral arguments before the United States Court of Appeals that was not contained in his brief and that was not possible in the trial Court and in this manner affect the decision of the United States Court of Appeals with the result that this Court in reading the opinion of the U. S. Court of Appeals was misled. It is possible that the trial Judge in the first trial could have been wrong in some particulars but not likely to have been as wrong as the U. S. Court of Appeals had held.

We believe that a brief review of the obvious facts, even without conflicting testimony would create a desire of this Court to reconsider this instant case; and surely property owners are concerned about matters that might affect a sale of their property.

If it was not for counsel for defendants at that time in the U. S. Court of Appeals having filed objection to extension of time for filing Appellee's brief of less than 8 pages which was then approximately two months overdue the Petition for Certiorari would no doubt been much more delayed. It is not often that the Court can permit a case to be reargued but owing to new developments and the importance of this case, not only to the parties involved but to the thousands of property owners whose property might be placed in jeopardy should induce this Court to grant a request to reconsider this instant case.

In the U. S. Court of Appeals questions were propounded that if properly answered would have had a vital bearing upon this case in favor of defendants-appellants in that Court. It was stated as folows:

> "Now, when he appended a provision that he, Buckner, should not be put to any expense in the way of

paying the Evening Star any additional consideration above the principal and accrued interest to release the lien. Now, if the Evening Star would under some circumstances and for some consideration accept payment at that time and release the lien, isn't it true that addendum would protect him. But, on the other hand, if the Evening Star would not under any circumstances or any consideration accept payment and release its lien, then wouldn't it be true the original obligation of Buckner comes in to play in that he was required to clear the property of liens, and he was unable to do it at all? If that be true, isn't it clearly very material to know what the record shows as to what the attitude of the Evening Star was, whether it would or would not accept payment at that time?"

Mr. Hilland: "I think it is fair to state the evidence shows they would not accept payment under any circumstances. It is left there in the air; they were asked about that, and they would not release the existing trust, but would increase it to $9500."

It seems obvious that Counsel for plaintiff in former trial as well as in the last time in trial Court had the opportunity not to leave that question in the air. And further counsel heard plaintiff say (tr. p. 29):

"Yes, but I was informed by Mrs. Buckner that it could be paid off."

(tr. p. 38):

"Q. In the former trial, on page 38 of the record, you were asked by Mr. Denit this question:

"Q. Had you had your conversation at the Star before April 18th?

"A. Yes; during the time of my exclusive listing.

* * * *

(tr. p. 39):

"To my recollection, my conversation with the trust holder was after the sellers signed the sales contract."

When the contract was signed between purchaser and defendants it was nearly two months after the listing had

expired and there was no contract of employment after the listing had expired except the contract itself.

In the trial of *Kossow vs. Buckners,* photostat copy of transcription of record was attached to arguments for rehearing in the U. S. Court of Appeals and is now on file with clerk of the Supreme Court, he said: It would have to be refinanced, and a greater trust placed with the Star or otherwise be paid to date of maturity that is correct.

In the former trial one of defendants because there was difficulty in securing a correct explanation of how bonus was calculated was requested to answer questions concerning bonus a number of times as it was explained as date of settlement by one of defendants and it required questioning on 10 different pages as shown on transcription of record before it was at last clearly explained and counsel for both sides of the controversy beside the Judge of the trial Court participated in asking questions on that subject of the bonus. Then also can be found statements involving bonus on pages 12, 17, 18, 24, and 30 of Appendix.

With all these statements regarding bonus it seems it ought to be clear that the then existing trust could have been released by paying interest to maturity.

Then, after a little later, before the U. S. Court of Appeals counsel for plaintiff-appellee stated as follows:

> "After they accepted this contract the appellants decided they did not want to perform it, and they told Mr. Tweed and his salesman they found out the purchaser was a Jew, and they did not want to perform the contract. Plaintiff, himself did not say anything about that in the last trial after he had learned one of defendants was a Jew, and although counsel for plaintiff, I believe had a perfect right to continue along that line of argument, it seems out of place in the United States Court of Appeals under the circumstances."

Is it any wonder with such oral arguments as given before the U. S. Court of Appeals that a decision in favor of plaintiff-appellee in this instant case was secured.

Another peculiarity of this case occurred in the trial Court when a witness who was called in behalf of defendants testified contrary to a letter written by him to one of defendants as regards to advice given this defendant. And further adding lengthy damaging discussion that was supposed to have occurred in the settlement room of the Columbia Title Company but the meeting did not last long enough for such advice according to all the other witnesses. Counsel for plaintiff in arguing for a new trial after former trial in trial Court before Judge McMahon, stated as transcription of record of that argument on page 12, as follows:

> "Mr. Hirshman and Dr. Kossow testified, and Mr. Bradbury testified that there wasn't even time for Mr. Bradbury to get his pen out of the inkwell on May 18th. The foregoing as stated by counsel for plaintiff was a little exaggerated and further was closer to what Mr. Hirshman had testified to, then to the others; but it can be conceded that after the discussion started it did not last long enough for that damaging discussion to have taken place. All one of the defendants heard this witness say was as follows: "Mr. Tweed, you are suposed to be impartial in this case." And his advice being contrary to advice given by letter is conclusive there must have been some mistake; nevertheless the accusation against this witness if conclusively proven which accusation is respectively submitted to be vital and decisive to the justice and the merits of defendants' case. The authenticity and accuracy of defendants' testimony was placed in jeopardy by the misstatements of this witness in defendants' behalf."

COMPLAINT OR CAUSE OF ACTION LACKS CONSIDERATION

It is odd that complaint as stated on page 2 of Appendix does not show consideration in full; it is lacking its essential parts. In the case of Birmingham Ry. Light & Power Co. vs. Littleton, 201 Ala. 141, 77 So. 565, 573, The Court said: (in reference demurrer the Count was held defective) "That if the duty is based on contract it must appear in the complaint that the contract was valid and hence the consideration therefor must be expressly alleged. * * * So, then, if the duty of performance was upon them at all, it must be a binding one upon them and must be shown by the allegations of the complaint. To this end it is just as important to state expressly the consideration for defendants' promise as if the action were in assumpsit.

It is indispensable to the validity of a contract that it should be mutually obligatory upon both parties, or it will be binding upon neither. Bank vs. Steel, 10 Ala. 925; Borst vs. Simpson, 90 Ala. 373, 7 South 814.

He said: (Tr. p. 27): "I explained it thoroughly to Dr. Kossow, the purchaser, that the sellers assumed no responsibility in paying any bonus to pay off the existing first trust that any bonus to be paid would be entirely between he and I, that I would be willing to pay my part of it to pay off the existing trust."

Plaintiff did not fulfill his responsibility or ever intend to do so. If he wasn't obligated to assume that responsibility then the contract lacked mutuality as regards plaintiff and defendants.

In Evans vs. C. S. & M. Ry., 78 Ala. 341, the Court said: "All contracts founded upon mutual promise must

be obligatory upon both parties, so that each may have an action upon it, or neither will be bound by such a contract. The whole doctrine rests though mainly upon the absence of a consideration to support the promise. In order to constitute a contract there must be a concurrence of minds of both parties, as to the same thing."

Plaintiff did not pay the bonus to secure the release of the then existing trust or did he obtain from purchaser a promise that he would assume that expense. And, if by explaining to purchaser that the too-high-first-trust would not bind him to the contract as he could not obtain that amount of money, it was made to secure the purchaser's signature on the contract then should the plaintiff be held to the contract as to his obligation thereto or does the Courts wish to encourage that practice. Surely this method is now not going to be kept a secret—does the Courts wish to uphold a method of unconscionable contracts and thus increase litigation in the Courts; or, is the situation exactly as the Courts desire it and do consider a too-high-first trust written into a contract so that it would allow the purchaser under 99 out of 100 cases to withdraw from the sale if he so decided he did not want the property after all. Instead of the Courts aiding defendants in trying to stop this method of inducing potential purchasers to sign on the dotted line; the decision of the United States Court of Appeals will encourage that method of securing an option to purchase without costing one cent to purchaser and still holding property owners to the contract. With the decision of the jury "No meeting of the minds" how could purchaser be held to the contract. Then it boils down to the fact that the only party who was held to that contract were the defendants. If such a condition is not against public policy then what is?

The opinion (p. 1): In the view we take of the matter; we need not decide whether these variations deprived the contract of binding force as between appellants and the purchaser.

Does not the decision as shown in that opinion lead one to think that the situation of defendants has been correctly explained, and is that what the Courts want? Or, are we correct in thinking that the Courts when once convinced such practice is detrimental to the property owners will find a way to stop that practice—we sincerely believe the Courts will do that very thing when this Honorable Court is convinced such methods should not be encouraged.

TAKING PROPERTY WITHOUT DUE PROCESS OF LAW

Letter of instruction[1] left with deed seems to have given plaintiff the right of a commission. Now, if as the U. S. Court of Appeals infers that defendants never would have consummated the sale, and therefore probably didn't want to, then the letter of instructions was to catch he defendants unaware. But, if it is not the conclusion that defendants were not going through the deal then did not purchaser on May 6, 1943, without a tender after a registered letter had been sent by mail advising the defendants everything would be ready to consummate the sale and then when defendants arrived for settlement at the Columbia Title Company and there was no tender, a breach of the contract by purchaser? The second trust having not even been ordered until May 12th, 6 days later than that settlement meeting. Or was the letter of instruction an artifice in order to entitle plaintiffs to a commission. The Opinion stated (p. 3): Appellant could not by the instructions which they gave to the Title Company, turn the purchaser's privilege into a requirement, so far as the broker's rights are concerned." Then without any consideration and without mentioning the plaintiff's name and being independent of a void contract it must have entitled the plaintiff to a commission. There has not been one argument on that point by counsel for plaintiff or counsel for defendants in

[1] Letter of instruction on exhibit "A" with Clerk of Supreme Court.

the trial courts. As all parties in the case or connected with the transaction thought the letter of instruction was only stating strict compliance to the terms of the contract, it was beyond counsel's desire to even think of arguing that point and therefore defendants were not properly heard on the idea of the letter of instruction left with the deed to independently become that important as to entitle plaintiff to a commission. Under due process of law clause to the 5th Amendment to the Constitution defendants are entitled to be heard. If by postponing the settlement or giving the purchaser another chance to close the deal on strict compliance to contract gives the plaintiff a commission without the purchaser making a tender or showing that he could finance on that substitute plan then defendants were surely put on the spot as had defendants made a written agreement to accept the substitue plan of financing and the purchaser could not have been able financially to close the sale on that substitute plan then in that case there would have been no question but that plaintiff would have been entitled to commission.

And to change the words in the Heurich vs. Sullivan case from "identical terms" to "material deviation." Oh, no, that was not the case, it is by opinion not a change at all—it is still identical terms, except that the $11,000 is changed to $9,500, the down payment from $3,500 to $5,000 and still identical. In either case it is true the defendants get the same amount of money but if they wanted to buy back the house, that is the equity, it would have taken $1,500 more ready cash; and if they wanted to sell the house again it would have been much easier to sell with a $11,000 loan than with a $9,500 loan but nevertheless is it still to be considered identical. The purchaser was borrowing $3,500 from his brother in order to consummate the sale with the $9,500 first trust, but that second trust of $3,500 was it also identical with the $2,450 second trust

to be made to defendant and therefore purchaser could have as easily made out a second trust for $2,450 to defendant as a $3,500 second trust to his brother but would the second trust made to defendant for $2,450 given the purchaser the same amount of ready cash as the $3,500 second trust made to his brother and was that not why a second trust made to brother was on deposit at the Title Company on May 6, 1943, and not the $2,450 made to defendants; but according to what they would like the Court to believe, the all cash was an alternative proposition. (Opinion stated p. 1): The parties met on May 6, 1943, to close the sale. The purchaser proposed to execute a first trust of $9,500 and if appellants desired, to pay the entire balance of the purchase price in cash.

Defendants consider themselves lucky that the purchaser did not insist upon paying all cash above the $9,500 but one witness in a letter to defendants said that is what the purchaser did insist on doing; but this witness also explained that differently at the trial. So taking it that it was an accommodation offer it was to that extent an advantage to defendants as had purchaser insisted on paying all cash above the $9,500, the Court could have explained how much better that would have been than a second trust. So instead of one substitute plan defendants might as well had another. So, when the Courts decide to make contracts for property owners no one will know when they have a binding contract until probably after three years of litigation in the Courts.

Had defendants the opportunity of refuting these arguments by a rehearing it might have given them a chance to be heard on some of these questions providing that counsel for plaintiff is not given the privilege of the last arguments each time when he appears in either one of the Courts of Appeals.

It is obvious by counsel for plaintiff's argument before Judge McMahon in arguing for a new trial page 14, of

the transcription of arguments which is now on exhibit with clerk of the Supreme Court, stated as follows: "If Dr. Kossow had been seeking specific performance of the contract in a court of equity, the court would have to deny specific performance, * * *"

And, further with the verdict, "No meeting of the minds" purchaser could not have been held on that contract. Opinion stated (p. 3): "Appellants urge that a tender by the purchaser was necessary. Appellants' refusal to proceed on the basis of a $9,500 first trust would have dispensed with any such requirement, even apart from the fact that appellants tendered no deed."

A letter attached from the Columbia Title Company that was attached to the arguments for a rehearing and now with clerk of Supreme Court states in part as follows: If at the date of settlement, the money has not been deposited with us, then it is not necessary for the grantor to execute and acknowledge the deed, and if the deed, properly executed and acknowledged, is in the possession of the grantor, delivery to us would not be requested.

(Appdx. 12) under Statement of Proceeding and Evidence it states: "At the May 18, 1943, meeting, the defendants, had with them, the properly executed deed for the property."

In the case of Stoddard vs. Abercrombie, et ux, 266 P. 431, 166 Idaho 69, the Court said, in part: "Idle ceremony to have tendered deed."

But defendants were denied the opportunity to be heard on this question. We believe this is a question to be decided finally by the United States Supreme Court.

One of defendants signed letter of May 7, 1943, addressed to The Columbia Title Company which states in part as follows:

> "Please notify me when the purchaser has made settlement in accordance with the terms of the contract, or has furnished you evidence that he is in a position to make the settlement."

Now, if purchaser had made tender defendants were to be notified but they were not so notified by the Columbia Title Company because the purchaser had not made a tender. This letter is now on exhibit with clerk of the Supreme Court.

In the Kossow vs. Buckner jury trial, the verdict was in the favor of defendants and how the jury came to its conclusions no one knows except the letter of instructions was mentioned in that trial. If the issues are presented to the jury and in their verdict neither issue is singled out the verdict is supposed to be on all issues. Therefore the importance of the letter of instructions was also decided by that jury.

In Lavender vs. Kurn, a very recent case, in supplement, Law Ed. vol. 90, p. 693, this Court said:

> "The appellate court's function is exhausted when the evidentiary basis of the verdict becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Had defendants been heard concerning the importance of the letter of instructions many arguments could have been presented on that rehearing concerning the importance of that letter and further had defendants thought the United States Court of Appeals would have attached such importance to that letter the defendants would not have appealed the case.

It seems that the U. S. Court of Appeals based its decision on the letter of instruction still the contents of that letter was not on file with that court in the transcript of the record.

PRINCIPLES APPLICABLE TO FIDUCIARY RELATIONS—REPRESENTING BOTH PARTIES IS NOT IN HARMONY WITH THOSE PRINCIPLES

The contract with the price stated therein was brought to defendants with their signatures attached thereto. The

listing was for $19,500, the contract price $16,950; $2,550 less than the listing price, quite a reduction from that price, but as the listing contract had expired that probably made no difference. (tr. 45): Q. That isn't what you said. I ask you again, to get it perfectly clear. Did you, or did you not, answer "yes" to this question? A. I did.

Mr. Stafford: The question is, Mr. Reporter: "You were of the opinion that it was worth $19,500 on April 18, 1943." The Witness: I did.

Defendants were sued by purchaser in a trial by jury and plaintiff was expert appraiser for purchaser and without plaintiff's statement that the property was worth $19,500 there would not have been any basis for damages. But in an action against principal, agent is privy to principal. In Restatement of Law, Agency, ch. 13, sec. 399, pages 906-907, it states as follows:

> "If after the agent has received such notice, the principal is unsuccessful in the suit and, after a defense in good faith is required to pay, the issues therein involved are res judicata between them."

Surely plaintiff was at fault for "No meeting of the mind" verdict of the jury which did would have resulted in favor of defendants.

Here, then is plaintiff who should act with loyalty to his principal but is in collusion with purchaser. And further purchaser never tendered a settlement; and, after sending defendants a notification that everything would be ready and this notification by registered mail, and this appeared to two settlement meetings. There was also another notification of a different settlement meeting. How many times is a purchaser allowed to notify vendor to attend a settlement meeting and then be excused for not being prepared to make a tender.

In regards to the $3,500 second trust to brother of purchaser that was kept a secret from defendants as to amount

of same. It is the duty of a broker to disclose such financial conditions of purchaser.

Then plaintiff agreed to a $43 bonus for purchaser when he must have known from his experience that it would not be enough money to release that type of loan and that he, the plaintiff, had no intention to pay the balance. Does not these actions as heretofore enumerated constitute Double-dealing as explained in the Kilbourne vs. Sunderland case in supra which case originated in the District of Columbia and does not this instant case present more constitutional questions, more conflicting opinions between the Courts, and also present is a closely adjudicated jury trial in favor of defendants, and are those not questions on which certiorari are granted.

CONCLUSION

In conclusion, we urge this Honorable Court to reconsider the petition filed herein, and reverse the findings of the Court below.

Respectfully submitted,

BEN LINDAS

Counsel for Appellant-Petitioners.